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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

v.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the standard for terminating consent decrees in cases involving governmental defendants enunciated in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992) also govern in cases involving private, non-governmental defendants?

2. Did the lower courts err in granting defendants' motions to dissolve the consent decree in this Title VII action when the defendants failed to demonstrate compliance with the decree and in the face of evidence and findings by the court-appointed Administrator and the trial court that defendants were continuing to violate the decree?

PARTIES

The participants in the proceedings below were:

John R. Patterson, Roland J. Broussard, Elmer Stevenson, and the class they represent,

Plaintiffs.

The United States Equal Employment Opportunity Commission,

Plaintiff.

Newspaper & Mail Deliverers Union of New York & Vicinity; New York Times Company; Maxwell Newspapers, Inc. (New York Daily News, Inc.); New York Post; Dow Jones Co., Inc.; Evening Journal Association; Hudson News Company; Metropolitan News Company; Passaic County News Company; Rockland News Agency; Raritan Periodical Sales; Bay City News Company; Brodsky News Co.; Crescent News Distributors Incorporated; Flushing News Company; Gaynor News Co.; Jersey Coast News Co.; Long Island News Corp.; Newark Newsdealers Supply Company; New Brunswick Newsdealers Co.; S. Rachles Newsdealers; Standard News Co.; Union County Newsdealer Supply Co.; Boro Park News Co.; Merit News Co., Inc.; Tribune New York Holdings, Inc.; Westfair Newspaper Distributors; NDI/Newspaper Distributors; Amsterdam News Company; El-Diaro-La Prensa; Fairchild Publications; Magazine Distributors, Inc's and MDI Distributors, Ltd.; A Co.; Bronx County News Company; Bronxville News Company; Brooklyn Daily Inc.; Brooklyn News Company; Brownsville News Co.; East Island News Company; Eluyn News Co.; F. Printico; G.I. Distributors, Inc.; Weinberg News Co.; Imperial News Co.; Long Island Press Publishing Co.; Long View Publishing Co.; Manhattan News Co., Inc.; Mill Basin News Co.; New York News Incorporated; Newark Morning Ledger, Co.; Ridgewood News Company; T Co.,

Defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John R. Patterson, Roland J. Broussard, and Elmer Stevenson, on their own behalf and on behalf of all other persons similarly situated, respectfully pray that a writ of certiorari issue to review the opinion of the Court of Appeals for the Second Circuit entered in this proceeding December 20, 1993.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 13 F.3d 33 (2d Cir. 1993) and is set out at pages 1a-12a of the Appendix hereto ("App."). The order of the Court of Appeals denying a timely petition for rehearing and

suggestion for rehearing *en banc* is unreported and is set out at App. at 13a-14a. The decision of the United States District Court for the Southern District of New York that was affirmed by the Court of Appeals is reported at 797 F. Supp. 1174 (S.D.N.Y. 1992) and is set out at 100a-121a. Other decisions of the district court and of the Court of Appeals that are relevant to the issues presented by this petition and that are referred to herein, are set out in the Appendix as follows: 384 F. Supp. 585 (S.D.N.Y. 1974), 15a-32a; unreported Final Order and Judgment, 33a-35a; 514 F.2d 1767 (2nd Cir. 1975), 36a-54a; 23 E.P.D. ¶ 31,001 (S.D.N.Y. 1980), 55a-62a; 42 E.P.D. ¶ 36,722 (S.D.N.Y. 1986), 63a-67a; 46 E.P.D. ¶ 36,722 (S.D.N.Y. 1988), 68a-74a; 772 F. Supp. 1439 (S.D.N.Y. 1991), 75a-92a; 777 F. Supp. 1190 (S.D.N.Y. 1991), 93a-99a; 802 F. Supp. 1053 (S.D.N.Y. 1992), 122a-133a.

JURISDICTION

The decision of the Second Circuit was entered on December 20, 1993. A timely petition for rehearing was filed and was denied on February 7, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), which provides in pertinent part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions of employment, because of such

> individual's race, color, religion, sex, or national origin;
>
> * * *
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

This case also involves 42 U.S.C. § 1981, which provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

STATEMENT OF THE CASE

A. The Proceedings Below.

This action is based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. It was filed by African American employees of various newspapers on their own behalf and on behalf of a class on July 11, 1973. The complaint alleged that the defendant Newspaper and Mail Drivers' Union (N.M.D.U.) and a number of New York area newspapers and newspaper distributors, including the New York Times and the Daily News[1], had engaged in a variety of practices that had the purpose and effect of discriminating against African American drivers. (J.A. 1-14.)[2] Subsequently, an action making similar allegations was filed by the United States Equal Employment Opportunity Commission. (J.A. 30-38.) The two cases were consolidated for all purposes and a four week trial on the merits was held in 1974 before then District Court Judge Lawrence W. Pierce.

After the trial had concluded, the parties entered into a settlement agreement that was approved by Judge Pierce, who made findings of fact and entered a consent decree that embodied the injunction at issue here. *Patterson v. NMDU*, 384 F. Supp. 585 (S.D.N.Y. 1974). (App. 15a-35a.) A white worker objected to the decree and filed an appeal to the

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[1]Although the consent decree was signed by virtually all of the newspaper publishers and distributors in the New York Metropolitan Area for whom the N.M.D.U. is the bargaining agent, only N.M.D.U. the New York Times, the New York Daily News, and the New York Post were actively involved in the proceedings that led to the dissolution of the consent decree that is at issue here. Only the Times and the News actually participated in the appeal in the Second Circuit.

[2]Record citations are to the Joint Appendix filed below ("J.A.") or to the original record.

Second Circuit. The court affirmed the entry of the decree on March 20, 1975 and the case was returned to the district court. *Patterson v. NMDU*, 514 F.2d 767 (2nd Cir. 1975). (App. 36a-54a.)

On November 9, 1979, a number of the defendants moved to modify the decree by eliminating the role of the Interim Administrator. Judge Pierce denied the motion on a number of grounds, including a finding that the goals and timetables provisions had not been met, and that there continued to be claims that the decree was being violated in a number of respects. (App. 55a-62a.) In 1985, the Times and other defendants filed a second motion. Since Judge Pierce had been elevated to the court of appeals, the case had been assigned to Judge Conner in 1982. Both the private plaintiffs and the EEOC opposed the motion and various proceedings took place, which will be described in more detail below. Finally, on July 29, 1992, Judge Conner issued an order vacating the injunction in its entirety, although jurisdiction was retained to resolve certain outstanding claims by class members. Judge Conner also denied a motion to alter and amend the judgment and a motion by private plaintiffs to restore the injunction pending appeal. (App. 100a-121a; 122a-133a.)

Both the private plaintiffs and the EEOC appealed. The Second Circuit affirmed, holding that the standard enunciated by this Court in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992) for vacating or modifying consent decrees when the defendant was a local governmental agency should be applied in all cases. The court acknowledged a division between the circuits on this issue. (App. 9a.) The Court of Appeals did not mention or discuss the issue of the defendants' failure to demonstrate that they had complied with all aspects of the decree over a reasonable period of time, or the evidence introduced by the petitioners that, in fact, various of the defendants had violated the decree. Petitioners filed a

petition for rehearing and a suggestion for rehearing *en banc*. The petition for rehearing was based on the failure to deal with the issue of violations of the consent decree; the suggestion for rehearing *en banc* was based on whether *Rufo* should apply where the defendant was not a governmental agency. The petition for rehearing was denied without opinion on February 7, 1994.

B. Statement of the Facts.

1. History of Discrimination in the Industry.

Although this case was settled by the parties, Judge Pierce had before him the record of a four-week trial on the merits of the claims of racial discrimination in the industry. Thus, when he approved the decree he made detailed findings of fact. The focus of the claims were jobs at all of the newspapers and other publishers who employed members of the Newspaper and Mail Drivers Union to deliver newspapers and other periodicals in the metropolitan area of New York City and outlying areas.

Judge Pierce described the way the industry functioned:

> The nature of the delivery industry is such that the employers' needs for delivery department employees vary from day to day, and indeed, shift to shift, depending upon the size and quantity of the publication(s) being distributed. Thus, each employer . . . maintains a regular work force (Regular Situation holders) for its minimum needs, and depends upon daily shapers to supplement the force. . . . [A]t the major employers the shapers are categorized into groups with descending daily hiring priorities. Group I is restricted . . . to persons who have at one time held a Regular Situation in the industry. They have first shaping priority at every shift, in order of their

> shop seniority. After the Group I is exhausted . . . the next hiring priority shall go to Group II members [consisting] of all persons in Group I and all persons holding Regular Situations in the industry. . . . [T]he remaining open jobs, if any, will go to Group III members who have appeared for the shape, in order of their shop tenure.

(App. 19a.) All of the jobs involve equivalent skills, regardless of which list the worker who fills them is on. The jobs are unskilled and most workers either drive trucks or do floor work. Because the contract provides that a Regular Situation is required for Union membership, only Regular Situation holders and members of Groups I and II are Union members. Finally, the Group system provides the priority list for filling Regular Situations as they may become vacant. (App. 20a.)

The Union was founded in 1901 and apparently had no minority members. Historically, the Union constitution limited membership to "the first born legitimate son" of a member. (App. 20a.) The industry had a closed shop and Union members were consistently hired before non-Union men at all industry shapes. Prior to 1952, when the Group structure was adopted, the Union's nepotistic policy resulted in discrimination against minorities (and, of course, women) and foreclosed them from any employment in the industry. Although the Group structure appeared on its face to discard discriminatory policies and to open up Union membership and employment policies to the entire labor force, "there is uncontroverted evidence that certain . . . provisions of the contract have been administered haphazardly, and that the Group structure has been circumvented by friends and family of Union members. In practice . . . no non-Union Group III shaper in the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group system since 1963." (App. 21a.)

Since minorities had historically been denied free and equal access to Union membership, the result was that they continued to be almost totally excluded from the industry. In 1974, there were 4,200 members of the Union, including 900 pensioners. *More than 99% of these Union members were White.* Of 2,855 persons actively working in the industry, including 2,460 Regular Situation, 123 Group I members, and 272 Group III members, only 70 persons — *or 2%* — were African American, Spanish-surnamed, Asian, or Native American. (App. 21a-22a.)

Thus, twenty years after the industry instituted a purportedly neutral Group structure of employment and hiring priorities, minorities were still almost totally excluded from the industry. Based on statistical analyses presented by the EEOC, Judge Pierce found that the relevant work force for the industry in 1974 was 30% minority. Therefore, their participation was "still grossly disproportionate" to what would be expected in the absence of discrimination. (App. 22a.)

2. The Consent Decree.

Based on the above findings regarding discrimination against minorities in the industry, Judge Pierce approved the settlement agreement presented by the parties. (J.A. 50-99.) All parties voluntarily agreed to the entry of an injunction that was designed to end the entrenched practices in the industry that had excluded minority workers.

The injunction was in three parts, all of which ran against both the union and the employers. Section A, titled "Equitable Relief" was described by Judge Pierce thus: "As with many resolutions of employment discrimination cases, the Settlement Agreement in these actions contains general provisions permanently enjoining the defendants from discriminatory practices in violation of Title VII." (App. 22a.) Section A provides, *inter alia*:

defendant [NMDU] . . . will be *permanently* enjoined

> from engaging in any act or practice which has the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin . . . nor shall they take any action which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin.
>
> defendant employers . . . will be *permanently* enjoined from engaging in any act or practice which has the purpose or the effect of discriminating against any individual or class of individuals in their bargaining units represented by NMDU on the basis of race, color or national origin. They shall not fail or refuse to hire for employment any such individual on the basis of race, color or national origin, not shall they take any other action which would deprive any such individual of equal employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color or national origin.

(J.A. 57-58.)(Emphasis added.)

Section B of the consent decree established an Administrator, who was empowered "to take all actions . . . as he deems necessary to implement the performance of the Order." The Administrator was not only to supervise the new affirmative action provisions of the decree closely, but also to closely supervise "employment opportunities in the industry on behalf of all workers." (J.A. 59) The powers of the Administrator included determining "all complaints that any individual in the bargaining units in the industry represented by NMDU has been allegedly denied equal employment opportunities on the basis of race, color or national origin." (App. 57a.) Some of the Administrator's duties were explicitly tied to rectifying or deterring areas of

industry practice that were particularly abused in the past — *e.g.*, use of layoffs and transfers to "jump" non-minority drivers over minorities, or issuing arbitrary Group lists.[3]

Section C of the decree, entitled "AFFIRMATIVE ACTION PROGRAM," provided that the defendants shall institute an affirmative active program "designed so that a sufficient number of minority workers [Black, Spanish-surnamed, Oriental, and American Indians] will be employed by the defendant employers (and accepted for membership by NMDU as provided herein) within the bargaining units represented by NMDU in order to achieve a minimum goal of 25% minority employment in the industry within such bargaining units *by June 1, 1979*." (J.A. 60-61; emphasis added.) The decree contained detailed provisions by which the goal of 25% minority employment by June 1, 1979, was to be reached. The Administrator was given broad powers to oversee the carrying out of the affirmative action plan and

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[3]Judge Pierce further described the role of the Administrator:

> The Administrator appointed in these consolidated actions will be charged with the responsibility of seeing that the terms of the Settlement Agreement under Title VII of the Civil Rights Act of 1964 are diligently and conscientiously implemented. This Act was designed primarily to protect, and provide a more effective means to enforce, the civil rights of persons within the jurisdiction of the United States. It aims, inter alia, to eliminate discriminatory practices by businesses, labor unions, or employment agencies and thereby to encourage the growth of economic opportunities for minority individuals, thus strengthening the economic foundation essential to the full enjoyment of civil rights.
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> * * *
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> In light of these broad national purposes, this Court considers it of paramount importance that the Administrator it appoints here possess a finely tuned sensitivity to the social impact of past discriminatory employment practices, and a balanced sense of dedication and commitment to the elimination of these practices.

(App. 30a.)

to ensure that the goal was reached. Judge Pierce summarized the major features of the plan:

> . . . elimination of past abuses of the Group system; elimination of the contract provision which restricted Group I to former Regular Situation holders; provision for an orderly flow of Group III shapers—alternating one minority person with one non-minority person—into steady and secure employment in the industry, first as members of Group I and from there, as Regular Situations become vacant, to Regular Situations. Union membership will be offered to each Group III worker as he reaches the bottom of Group I. *The plan further provides that until the 25% minority employment goal is achieved, employers shall hire, at the entry level, three minority persons for every two non-minority persons.* In addition, minorities who are presently active on Group III at the News and the Times will immediately move to the bottom of the Group I list, with an equal number of non-minorities to immediately follow them onto the Group I list.

(App. 23a-24a; emphasis added.)

With regard to the 25% minority employment goal in particular, Judge Pierce's opinion made findings that it was justified because the relevant workforce *as of 1974* was 30% minority. Therefore he held that a goal of 25% minority representation in the industry by June, 1979, was appropriate. (App. 28a-29a.)

The Second Circuit affirmed Judge Pierce's order in all respects. In its decision it recited the long history of discrimination in the industry:

> While the current Group Structure, which was adopted in 1952, appears on its face to open Union membership to anyone in the labor force, Union membership, because of lax administration of the

contract provisions, has largely remained attainable only by the family and friends of a Union member.

Manipulations of the system that resulted in the maintenance of a virtually all-white work force included "artificial inflation of the Group I lists," "fictitious lay-offs," and "outright false assertions of Group I status by persons who have obtained Union membership cards, the validity of which have not been challenged by employers." These practices violated Title VII by locking in "'minorities at the non-union level of entry in the industry, and thereby . . . perpetuat[ing] the impact of past discrimination.'" (App. 40a-41a.) The court affirmed the propriety of the 25% hiring goal specifically on the basis of its relationship, as found by Judge Pierce, to the relevant labor force as demonstrated by the 1970 census. (App. 44a.)

3. Compliance with the Affirmative Action Provisions.

In late 1979, defendant New York Daily News filed a motion seeking relief, under Rule 60(b), F. R. Civ. Proc., from certain provisions of the decree, particularly termination of the Administrator, whose term was set at five years, subject to being extended by the Court. Judge Pierce denied the motion and reappointed the Administrator as Interim Administrator. Judge Pierce specifically noted the failure of the defendants to meet the 25% goal within the time provided by the decree. Indeed, he found that the industry was only 12.16% minority, less than half of the goal that was set five years before. (App. 58a.)

4. The Role of the Administrator.

Throughout the life of the decree, the Administrator has played a vital role in overseeing compliance. Under the provisions of the settlement agreement, minority workers were able to file claims and to secure orders, where justified, to require compliance. Between 1974 and the end of 1981, at least 91 claims had been submitted and adjudicated, in some instances through appeals to the district court judge.

By the date of the dissolution of the decree, at least 278 claims had been submitted to the Administrator. Of key importance, as will be discussed in more detail below, has been the Administrator's role in ensuring that proper Group III and Group I lists were promulgated and in verifying the level of compliance with the Affirmative Action plan.

5. The Motions to Dissolve the Consent Decree.

In April, 1985, a number of the defendants filed new motions to vacate the order of Judge Pierce with regard to the Affirmative Action provisions and the Administrator. The basic argument made in support of these motions was that the 25% goal had been reached and that therefore the decree was no longer necessary.

Both the private plaintiffs and the EEOC strenuously objected to these motions.[4] Both agreed that Section A of the decree, embodying permanent injunctive relief, should be retained in its entirety. The private plaintiffs also urged that the court retain both the affirmative action provisions and the Administrator until full compliance with the decree had been demonstrated.

Judge Conner ordered that notice be given to the class that the Consent Decree might be vacated. After extensive pre-hearing briefing, an evidentiary hearing was begun in 1987. Judge Conner suspended the hearing when it became evident that the defendants could not prove that minority employment had in fact reached an asserted 24.89% industry-wide. (J.A. 272-73.)

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[4]While the EEOC initially took the position that the Administrator should be retained, in 1991 it took the view that only the permanent injunction provisions needed to be retained.

6. Plaintiffs' Response — The History of Non-compliance.

Plaintiffs presented substantial evidence that there had been a consistent pattern of violations of the decree. Specifically, *after* the defendants had filed their repeated motions to vacate the decree, the Administrator found various of the defendants had violated the decree and engaged in intentional discrimination. The following examples are illustrative.

a. In 1987 the Administrator held that the Daily News and the NMDU had violated the decree when they issued a new Group III list. The Administrator required them to use a revised list that was constructed in adherence to the requirements of the permanent injunction in Part A of the Decree and that would be consistent with the goals and timetables provisions in Part C. Judge Conner affirmed the decision on appeal by the NMDU. (App. 68a-74a.)

b. In 1990 the Administrator held that the New York Times and the NMDU had engaged in intentional discrimination in violation of a number of the provisions of the Decree, including Part A, when they issued a new Group III list that did not comply with the 3/2 ratio required by the Decree. He also found that the Times and the Union violated ¶ 15 of the decree dealing with the standards to be followed in giving preferences to certain employees to be placed on a Group III list, ¶ 29, dealing with the establishment of a system for the submission of applications, and ¶¶ 1 and 2, the general injunction provisions, in that there was intentional discriminatory treatment with regard to the offlist hiring of minority employees and other practices of the industry.[5] (J.A. 415.) Again, the decision of the

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[5]The Administrator had instructed the Times and the Union not to issue the list, but they did so anyway. The hearing on this matter (Claim 186) began in October, 1985, and ended 6,000 transcript pages later in May 1988. As a result of the Administrator's subsequent

Administrator was affirmed by Judge Conner. (App. 75a-92a).

c. In 1991 the Administrator found that the NMDU and the Westfair Newspaper Distributors had engaged in intentional discrimination and retaliation in violation of Part A by passing over two minority workers in favor of white workers. (J.A. 537-38.)[6]

d. In 1989 the Administrator found that a black driver had been discharged by Metropolitan News for racially motivated reasons. (J.A. 397.) On appeal to Judge Conner, the claim was settled by giving the claimant a Regular Situation and damages. (Rec. #224.)[7]

In addition, in 1991 plaintiffs submitted to the district court and the Administrator, as an Offer of Proof in opposition to the Motions to Dissolve the Decree, the affidavits and declarations of 29 minority employees attesting to continuing acts of discrimination in violation of the Decree. The complained of acts included restrictions in training opportunities, discrimination in the filling of foreman and supervisory positions, and an increase in retaliation and threats for complaining of discrimination.

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orders with regard to Claim 186, half of the 47 Regular Situation positions filled in the summer of 1992 went to minority workers. Proceedings to determine back pay for the Claim 186 claimants are still pending.

[6]This claim was settled by the parties pending an appeal to Judge Conner.

[7]In addition to these post-1985 claims, in 1984 the Administrator found that the New York Post and the Union had violated ¶ 15 of the Decree and had obstructed "the goals of the consent decree in seeking minority employment." He required the reordering of the Group I list and the Regular Situation Holders. Administrator's Decision in Claim 165, Jan. 4, 1984, p. 1. (Rec. # 69.) This order was affirmed by Judge Conner on July 10, 1984. (Rec. #73.)

Plaintiffs' Offer of Proof and Declarations, August 19, 1991. (Rec. #228.)

As noted above, in 1987 Judge Conner found the evidence insufficient to establish that the industry as a whole had met the 25% goal. (J.A. 277.) However, in 1988 he suspended the 3/2 ratio for placing workers on the Group III list. (J.A. 310.) Further briefing was requested on the defendants' motions to dissolve the decree. In the meantime, other individual claims of discrimination continued to be filed with the Administrator relating, inter alia, to carrying out the relief ordered with regard to the above listed matters. It was not until 1991, after Judge Conner ordered that compliance reports relating to the 25% goal be verified, that the defendants adduced legally competent evidence to support their claim that the goal had been reached and that 27.97% of the Regular Situation holders in the industry were minority.

The plaintiffs, on the other hand, argued that the goal should be adjusted to reflect the current labor market, which had increased to 42.4% minority according to the 1980 census[8] and to over 50% minority according to the 1990 census.[9] Since the 25% goal had not been reached until 12 years after the decree required, they suggested, the goal should be adjusted to reflect changed circumstances.

7. The Decision of the District Court.

On August 8, 1992, Judge Conner issued his decision dissolving the consent decree and the injunction embodied in it in its entirety. The reason given was that the 25% goal had been reached and that therefore the purpose of the decree had been satisfied. With regard to the private plaintiffs' evidence that the defendants had violated anti-

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[8]Judge Conner accepted this figure as accurate. (J.A. 265.)

[9]J.A. 697-98.

discrimination provisions of the decree in a variety of respects, the court held:

> Even assuming, *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree.
>
> * * *
>
> . . . The Court granted the LDF an opportunity to request an evidentiary hearing before the Administrator *on the only fact relevant to the issue of whether to terminate the Consent Decree -- whether the 25% minority employment goal has been achieved.* The LDF did not avail itself of that opportunity for over six months and cannot be heard to complain now.

(App. 114a-115a; emphasis added.)

The private plaintiffs filed a notice of appeal and a motion to reinstate the injunction pending appeal. In support of that motion they introduced affidavits from minority workers alleging further current discriminatory actions. (J.A. 719-77.) Although the district court denied that motion, it reaffirmed the jurisdiction of the Administrator to enforce prior orders and to resolve claims filed prior to August 8, 1992. (App. 127a-128a.) The EEOC also filed a notice of appeal. As noted above, the Court of Appeals affirmed the decision of the district court without mentioning, let alone addressing, the evidence of continuing violations of the decree.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents important issues concerning the standards that govern the dissolution of a consent decree entered as part of a negotiated settlement. Although this is a civil rights case, the decision below necessarily applies to all actions brought under federal law in federal court. *First*, the case raises squarely the question of whether this Court's seminal decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932) has any continuing vitality or whether, as the lower court held, it has been overruled *sub silentio* by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 116 L.Ed.2d 867 (1992).[10]

Second, the case raises the question of the meaning of the requirement reiterated by this Court in *Freeman v. Pitts*, 503 U.S. ___, 118 L.Ed.2d 108, 139 (1992), *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991) and *Rufo*, 116 L.Ed.2d at 886-87, that a defendant has a heavy burden of demonstrating good faith and substantial compliance with a consent decree as a precondition to having it modified or dissolved.

Third, the decision below has important implications concerning the binding effect of negotiated settlements and the impact on the settlement process of defendants being able to obtain dissolutions of consent decrees without demonstrating full compliance with all aspects of the agreement. In short, the question is, should a prohibitory injunction be vacated in the face of proof of continuing violations, based solely on proof (here disputed) that relief

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[10]Here, the issue arises in a case involving a negotiated settlement that embodies an injunction. The issue of whether the standard of *Swift* or that of *Rufo* governs modification or dissolution of an injunction also arises when the injunction has been imposed by a federal court as a result of a litigated case.

designed to remedy *past* acts of discrimination has been carried out.

I. THE CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE STANDARD THAT SHOULD GOVERN THE DISSOLUTION OF CONSENT DECREES ABOUT WHICH THERE IS CONFLICT BETWEEN THE CIRCUITS.

The basis for the decision below was that the standard established for modifying or dissolving consent decrees established by *United States v. Swift & Co., supra*, had effectively been superseded by this Court's decisions in *Dowell* and *Rufo*. The court acknowledged that the district court's decision in this case was apparently the first that so held (App. 8a.) It also acknowledged that "[a]mong other circuits, there appears to be some dispute as to the appropriate standard for modifying consent judgments." (App. 9a.)

Indeed, it is apparent that there is both conflict and uncertainty in the lower federal courts as to whether *Dowell* and *Rufo* overruled *Swift & Co.* Thus, while the Seventh Circuit has held that *Swift & Co*, was completely overruled by *Rufo* (*In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993)), the Sixth and Eighth Circuits have only applied *Rufo* to cases involving governmental entities (*Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992); *Epp v. Kerrey*, 964 F.2d 754 (8th Cir. 1992)), and the Federal Circuit has declined to apply the *Rufo* standard to commercial litigation involving a private defendant (*W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992)). The lack of certainty in the lower courts was recently discussed in the A.T. & T. anti-trust case, *United States v. Western Electric Co., Inc.*, ___ F. Supp. ___, 1994 WL 143082, p. 6 (D.D.C. April 5, 1994), citing *United States v. Western Electric, Co., Inc.*, 969 F.2d 1231, 1235 n. 7 (D.C. Cir. 1992).

Of course, neither *Dowell* nor *Rufo* explicitly overruled *Swift & Co.* To the contrary, those decisions only held that the *Swift* standard should not be applied to cases involving local government institutions because permanent governance by a federal court tended to undermine the representative and democratic character of such institutions. The fact that *Swift* was not explicitly overruled, in decisions that discuss its principles at some length, militates against a conclusion that *Swift* was, nevertheless, overruled *sub silentio*.

In any event, given the importance of the role of settlement and consent decrees in disposing of litigation in the federal courts, it is imperative that both litigants and the lower courts understand clearly what is the standard governing modification and dissolution of consent decrees. Therefore, this Court should grant certiorari to clarify and make explicit whether and to what extent the *Swift* standard still has vitality.

II. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH DECISIONS OF THIS COURT THAT REQUIRE THAT A DEFENDANT DEMONSTRATE COMPLIANCE WITH A CONSENT DECREE BEFORE THE DECREE CAN BE DISSOLVED.

As set out above, the district court itself had held on a number of occasions *after* the motions to dissolve the injunction had been filed, that both the Union and various of the other defendants had violated the decree and, indeed, had committed acts of intentional discrimination. Moreover, the private plaintiffs, petitioners herein, had introduced and proffered extensive evidence of other violations of specific provisions of the decree during the same period of time.

Nevertheless, the district refused to consider this evidence, holding that it was "irrelevant" in deciding whether to dissolve the decree in its entirety. Rather, it held that since one provision of the decree, that the industry have 25%

minority drivers, had been complied with, the decree could be dissolved.[11]

Under the decisions of this Court, it was clear error for the district court to hold that whether the defendants had continued to violate the consent decree was irrelevant to whether the decree should be dissolved. It was also error for the Court of Appeals to fail even to address this contention of plaintiffs. Thus, in *Dowell* the Court directed the district court to "address itself to whether the Board had complied in good faith with the . . . decree since it was entered" in deciding whether the decree should be dissolved. 498 U.S. at 249-50. *Rufo* held that where modification of a decree is sought because of unforeseen changed circumstances that make compliance difficult or "substantially more onerous," the party seeking modification must "satisfy a heavy burden" to demonstrate that it "made a reasonable effort to comply with the decree." 116 L.Ed. 2d at 886-87. And in *Freeman*, the Court made clear that a demonstration *by the defendant* of good faith compliance with a decree is a prerequisite to being relieved of its requirements. Thus, "[w]hen a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have without hesitation approved comprehensive and continued district court supervision." 118 L.Ed.2d at 139. Moreover, a demonstration of good faith compliance with part of decree

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[11]The petitioners continue to dispute whether even this provision of the decree had been complied with. The decree is clear that the goal was to achieve 25% minority representation *by June 1, 1979*, when such representation would reasonably reflect the relevant labor market. That goal was not achieved, and the defendants could not demonstrate that the industry was over 25% until 1991, twelve years late, and when the relevant labor market was over 50% minority. Thus, the effect of the lower court decision was to convert a goal designed to measure reasonable compliance into a rigid upper-limit quota that freed the defendants from further compliance with the settlement.

can *only* result in relief from those parts of the decree complied with. *Id.* at 139-40.

The decision below is therefore in clear conflict with governing decisions of this Court. Even if the *Swift* standard does not govern, the decisions in *Dowell*, *Rufo*, and *Freeman* mandate reversal.

III. The Decision of the Court Below Will Undermine the Settlement of Cases in Federal Court.

This Court has repeatedly held that the settlement of cases is highly favored, and has applied this rule to civil rights litigation on a number of occasions. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 732-33 (1986); *Marek v. Chesny*, 473 U.S. 1, 10 (1985). Albeit unintentionally, the decision below will substantially discourage plaintiffs from settling complex employment discrimination and other civil rights litigation.

Settlement decrees in these types of cases are achieved through an extensive and complicated process of negotiation. The result is inevitably a compromise, based on interdependent promises and obligations. A carefully framed decree will spell out the relationships between its provisions and when and under what circumstances certain provisions may be terminated. The decree in the present case is no exception.

As set out in the Statement of the Case above, the decree contained general prohibitions against discrimination, as well as a variety of specific obligations undertaken by the defendants, including receiving and processing applications for membership, the handling of grievances on a nondiscriminatory basis, the admission to membership in the Union of persons listed on an employer's Group I list on the same basis as others, assisting persons to obtain and retain membership, and the maintenance of registers and other

records. The decree also contained affirmative action provisions keyed to the goal of 25% minority representation by June 1, 1979, and provided for an Administrator to oversee the carrying out of the decree and to receive and adjudicate complaints of noncompliance.

The affirmative action provisions are intended to further the fundamental purpose of the decree that are set out in Part A, *i.e.*, the elimination of discrimination in the industry. The 25% representation was to be reached by June 1, 1979, when that representation was still related to the relevant labor market. If that goal was met on time, then the 50% and 60% hiring ratios would end. However, the settlement contemplated that the permanent parts of the decree would remain, and that the defendants would continue to be enjoined from engaging in discrimination prohibited by Title VII and by the decree itself, as well as required to follow various procedures set out in the decree. Of course, under principles now made clear by this Court, the defendants could seek the dissolution of even these parts of the decree by meeting their burden of demonstrating good faith compliance, *i.e.*, that they were no longer engaged in acts of discrimination. This they utterly failed to do.

Rather, the Court of Appeals has sanctioned virtually unlimited and unreviewable discretion to district courts to rewrite and dissolve a comprehensive settlement if any part of it has been complied with. This result derives from what the court below termed a "flexible standard for modifying decrees" whose purpose is to correct pervasive discrimination in an entire industry.

The message of the decision below to defendants, therefore, is that belated compliance with some goal embodied within a complex decree will mean freedom from all other contractual obligations into which they freely entered. The message to plaintiffs is equally clear; they can no longer rely on the sanctions of the law to enforce a settlement decree carefully negotiated and approved. Not

only do defendants not have to demonstrate compliance, but their protracted violation of a decree will be deemed "irrelevant." Plaintiffs' proof of continuing and serious breaches of an agreement and continued rampant discrimination will result in their being told that they must bring a new lawsuit.[12] Intransigence, if persisted in long enough, will thus be rewarded.

The combined force of these messages to plaintiffs is that only if they go forward and prove discrimination can they have confidence that a decree will remain in force until it is obeyed. A settlement, no matter how broad and inclusive it may be, cannot be relied upon. Such a result destroys any incentive for plaintiffs to enter into a settlement and, therefore, undermines the favored status of settlements established by decisions of this Court.

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[12]See the Appendix at 114a-116a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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